

A **KATHRYN MA WAI FONG v. WONG KIE CHIE & ANOR
AND OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
CHE MOHD RUZIMA GHAZALI JCA
B MOHAMED ZAINI MAZLAN JCA
[CIVIL APPEAL NOS: Q-02NCvC(W)-42-01-2020,
Q-02(NCVC)(W)-38-01-2020 & Q-02(NCVC)(W)-39-01-2020,
Q-02(NCVC)(W)-44-01-2020, Q-02(NCVC)(W)-41-01-2020
& Q-02(NCVC)(W)-43-01-2020]D
C 12 SEPTEMBER 2024

Abstract – *In a dispute regarding the issuance of shares, under the Duomatic principle, formalities can be disregarded if shareholders had, by conduct, waived the requirements. This is particularly applicable to family-run companies as it is a distinctive hallmark of family-run companies where the affairs are frequently conducted informally and often without adhering to the formal requirements of statutes or the company's Articles of Association. The Duomatic principle also clearly applies whether the approval is given in advance or prior to the event. Approval can take many forms, such as agreement, ratification, waiver or estoppel*

COMPANY LAW: *Shares – Issuance of – Nullification – Whether shares in breach of s. 132D(1) of Companies Act 1965 – Duomatic principle – Whether applicable – Whether ordinary resolutions passed regarding approval of issuance of shares – Whether formalities may be disregarded if shareholders waived requirements – Whether informal assent evidenced by conduct – Whether validation order would cause injustice – Companies Act 1965, ss. 63 & 355*

G There were six appeals before this court, which were closely related as they pertained to disputes regarding family-owned entities, namely WTK Realty Sdn Bhd ('WTK Realty'), Southwind Plantation Sdn Bhd ('Southwind') and Ocarina Development Sdn Bhd ('Ocarina'). The late Wong Tuong Kwong ('Wong') was the patriarch of the Wong family and the founder of WTK Realty, which had expanded its subsidiaries and related companies over the years. Southwind and Ocarina were part of the WTK Realty conglomerate. H The late Wong had three sons, Wong Kie Nai ('WKN'), Wong Kie Yik ('WKY') and Wong Kie Chie ('WKC'). The affairs of WTK Realty and its related companies were managed by the three sons upon Wong's demise in 2004. WKC moved to Australia to manage the siblings' business while I WKN and WKY remained in Malaysia to manage WTK Realty and its related companies. WKN, WKY and WKC held equal shares in WTK

Realty, Southwind and Ocarina. The suits filed in the High Court were mainly concerned with the new shares issued to WKN in WTK Realty, Southwind and Ocarina. WKN passed away in March 2013, leaving behind his widow Kathryn Ma ('Kathryn'), a son and a daughter. Kathryn was appointed the personal representative, executrix and trustee of WKN's estate. She had requested that shares issued to WKN in these companies be registered in her name as the executrix of WKN's estate. WKC and WKY refused and commenced suits with respect to the issued shares in the same year of WKN's demise. In essence, they sought to nullify the issued shares because the issuances were in breach of s. 132D(1) of the Companies Act 1965 ('CA 1965') as they were carried out without the shareholders' prior approval. In addition, WKC and WKY also alleged that some of the requirements under the companies' Articles of Association ('AA') were not complied with. Kathryn, as the appellant, reciprocated by filing her suits where she sought to validate the shares issued under ss. 63 and/or 355 of the CA 1965. Therefore, the flip side to the three suits commenced against her were her suits for validation. The following orders were sought at the High Court against WKN in respect of the following appeals (i) Appeal 42: WKC sought to nullify the issuance of 4,000,000 ordinary shares of WTK Realty allotted to WKN; (ii) Appeal 38: Kathryn's application to validate the issuance of the 4,000,000 shares of WTK Realty to WKN under ss. 63 and/or 355 of the CA 1965 and WKN's AA; (iii) Appeal 39: WKC and WKY sought to nullify the issuance of 3,000,000 ordinary shares of Southwind allotted to WKN; (iv) Appeal 44: Kathryn's application to validate the issuance of the 3,000,000 ordinary shares in Southwind under ss. 63 and/or 355 of the CA 1965 and WKN's AA; (v) Appeal 43: WKC and WKY sought to nullify the issuance of ordinary shares in Ocarina; 1,500,000 allotted to WKN; and (vi) Appeal 41: Kathryn's application to validate the issuance of the 1,500,000 ordinary shares of Ocarina allotted to WKN under ss. 63 and/or 355 of the CA 1965 and Ocarina's AA. Kathryn had relied heavily on the principle enunciated in the English case of *In re Duomatic Ltd* ('Duomatic case') which laid down the proposition that matters which were to be done formally may be done informally, provided that it was assented to by the members of the company. Kathryn's case in the High Court was that the informal assent of the shareholders occurred after the shares were issued, which would fall under the *Duomatic* principle. WKC and WKY disagreed, as they contended that the informal assent must occur prior to the issuance. The High Court agreed with their proposition. In respect of the appellant's application for validation under ss. 63 and 355 of the CA 1965, the High Court, in dismissing the application, held that apart from the breaches of the companies' AA, there was no prior shareholders' approval for the issued shares based on the absence of any minutes of the shareholders' meeting. The High Court opined that a validation order would cause injustice to WKC as his shares would be diluted and did not fulfil the

A criteria under s. 355(3)(b) of the CA 1965. The core issue of these appeals was whether the High Court erred in holding that the *Duomatic* principle applied only if the assent was obtained prior to the shares being issued.

Held (allowing appeals; setting aside order of High Court)

Per Mohamed Zaini Mazlan JCA delivering the judgment of the court:

- B (1) The *Duomatic* principle clearly applied whether the approval was given in advance or prior to the event. Approval can take many forms, such as agreement, ratification, waiver or estoppel. The High Court had misconstrued the facts of the *Duomatic* case when it held that the assent in that case, namely the payment of the directors' salaries without the shareholders' approval, predated the act in question when it was clear that the shareholders' assent came months after the act. The High Court erred in holding that the approval had to be given prior to the shares being issued and had erroneously applied the correct law on the facts. (paras 19 & 21)
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- D (2) There was no dispute that Form 11 was lodged with the Companies Commission of Malaysia, nor was the form alleged to be forged. This was concerning the EGM held on 28 September 2007. An ordinary resolution was passed at this EGM to increase WTK's paid up capital by 4,000,000 shares. WKC had agreed that WKN and WKY were the brothers in charge of managing WTK Realty's business in Malaysia. It was therefore incongruous to deem Form 11 invalid as WKN had signed it. As Kathryn had produced Form 11 evidencing that the EGM to approve the issuance of the 4,000,000 shares was held on 28 September 2007, the burden lay on WKC to prove that the resolution was not attached to Form 11 or that the EGM never took place, mainly when WKC had access to the companies' books and records. The High Court erred in accepting WKC's contention that the resolution was not attached to Form 11 when the burden lay on him to prove so. In any event, even if there was no resolution attached to Form 11, this did not vitiate the resolution passed at the EGM or render the shares issued void. (paras 22- 24)
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- F
- G (3) The High Court disregarded the fact that both WKN and WKY had signed the Form 24 on the allotment of 4,000,000 shares to WKN and that it was signed on behalf of the Board of Directors. That WKC did not sign the form did not negate assent or knowledge on his part. In this case, many factors inferred WKC's knowledge from his conduct. Informal assent could be evidenced by conduct. (para 27)
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- I (4) The most compelling evidence to prove that the respondents had knowledge and acquiesced to the issued shares were the directors' report and audited accounts from 2005 to 2011. Consequently, they had, by conduct, approved of the issued shares. WKC and WKY could not

approve and reprobate. The shareholders' resolution passed at the EGM to capitalise the share capital, which included the issued shares, must be treated as an affirmation or ratification. Under the *Duomatic* principle, formalities may be disregarded if shareholders had, by conduct, waived the requirements. This was particularly applicable to family-run companies as it was a distinctive hallmark of family-run companies, where the affairs were frequently conducted informally and often without adhering to the formal requirements of statutes or the company's AA. (paras 28-36)

- (5) There was a delay by WKC and WKY in seeking declaratory reliefs. Their suits were commenced almost six to seven years after the shares were issued to WKN. The lengthy delay connoted knowledge and acquiescence on their part. As the remedy of declaration is discretionary in nature, the court should be less inclined to grant them where the party seeking the reliefs is guilty of laches. (para 37)
- (6) The High Court had misdirected itself on the applicable law and applied it erroneously on the facts. The High Court did not give sufficient judicial appreciation of the evidence before it. There were merits to Appeal 42, Appeal 39 and Appeal 43, which were allowed. As the appellant's appeals in the said appeals were permitted, there was no necessity for the validation applications sought by the appellant in Appeal 38, Appeal 44 and Appeal 41. Thus, the decisions of the High Court were set aside. (para 38)

Case(s) referred to:

- Cheah Kim Tong & Anor v. Taro Kaur* [1989] 2 CLJ 791; [1989] 1 CLJ (Rep) 378 HC (refd)
- Dickinson v. NAL Realisations (Staffordshire) Ltd* [2020] 1 WLR 1122 (refd)
- EIC Services Ltd v. Phipps* [2004] 2 BCLC 589 (refd)
- Genisys Integrated Engineers Pte Ltd v. UEM Genisys Sdn Bhd & Ors* [2009] CLJU 1202; [2009] 1 LNS 1202 CA (refd)
- Herman v. Simon* [1990] 8 ACLC 1094 (refd)
- In re Duomatic Ltd* [1969] 2 Ch 365 (refd)
- Jimat Awang & Ors v. Lai Wee Ngen* [1995] 3 SLR (R) 496 (refd)
- Khaw Tiew Chai v. Lee Chai Seng & Ors And Another Appeal* [2018] CLJU 1516; [2018] 1 LNS 1516 CA (refd)
- Lim Teow Yong & Sons Sdn Bhd v. Infolity Sdn Bhd & Anor* [2015] CLJU 311; [2015] 1 LNS 311 HC (refd)
- Multinational Gas And Petrochemical Co v. Multinational Gas And Petrochemical Services Ltd* [1983] Ch 258 (refd)
- Tan Mei Li & Ors v. KSCH Property Sdn Bhd* [2019] CLJU 1186; [2019] 1 LNS 1186 CA (refd)
- Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119 FC (refd)
- Verschures Creameries, Limited v. Hull And Netherlands Steamship Company, Limited* [1921] 2 KB 608 (refd)
- Weatherley v. Weatherley & Others* [2019] 1 BCLC 520 (refd)

A Legislation referred to:

Companies Act 1965, ss. 63, 132D(1), (6), 355(3)(b)
Rules of Court 2012, O. 38 r. 2(2)

Companies Act 1967 [Sing], s. 161(1)

For the appellants - Alvin Yong & Shirleen Ong; M/s Alvin Yong Advocs

B

(Civil Appeal No: Q-02(NCvC)(W)-42-01-2020 & Q-02(NCVC)(W)-38-01-2020)

For the respondents - George Lim, Stanley Eddy & Chan Yin Xi; M/s Battenberg & Talma

(Civil Appeal No: Q-02(NCVC)(W)-39-01-2020 & Q-02(NCVC)(W)-44-01-2020)

For the respondents - Sim Hui Chuang; M/s Reddi & Co Advocs

C

(Civil Appeal No: Q-02(NCVC)(W)-41-01-2020 & Q-02(NCVC)(W)-43-01-2020)

For the respondents - George Lim, Stanley Eddy & Chan Yin Xi; M/s Battenberg & Talma

Reported by Suhainah Wahiduddin

JUDGMENT

D

Mohamed Zaini Mazlan JCA:

Introduction

E [1] Six appeals came before us. All these six appeals were closely related as they pertained to disputes regarding family-owned entities, namely WTK Realty Sdn Bhd ('WTK Realty'), Southwind Plantation Sdn Bhd ('Southwind') and Ocarina Development Sdn Bhd ('Ocarina').

F [2] These companies were primarily owned and run by three brothers. The dispute arose over shares issued to one who has since passed away. The remaining brothers claimed that the shares issued to the deceased brother were void and sought to nullify them. On the other hand, the deceased brother's widow had sought to validate the shares. The High Court had ruled in favour of the two brothers.

G [3] The pivotal issues in these appeals are whether there was informal assent to the issued shares and, if there were, whether the assent must occur prior to the shares being issued. This will entail a discussion on the *Duomatic* principle derived from the case of *In re Duomatic Ltd* [1969] 2 Ch 365.

Facts

H [4] The late Wong Tuong Kwong ('Wong') was the patriarch of the Wong family and the founder of WTK Realty, which had expanded its subsidiaries and related companies over the years. Southwind and Ocarina were part of the WTK Realty conglomerate. The late Wong had three sons, Wong Kie Nai ('WKN'), Wong Kie Yik ('WKY') and Wong Kie Chie ('WKC'). As in most family-owned businesses, the affairs of WTK Realty and its related companies were managed by the three sons upon Wong's demise in 2004.

I WKC moved to Australia in the 80s to manage the siblings' businesses, while

WKN and WKY remained here to manage WTK Realty and its related companies. WKN, WKY and WKC held equal shares in WTK Realty, Southwind and Ocarina. That was then, as the consternation now concerns the inequality of shares between the three brothers.

[5] The suits filed in the High Court were mainly concerned with the new shares issued to WKN in WTK Realty, Southwind and Ocarina as follows:

Company	Shares issued	Dates issued
WTK Realty	4,000,000	28 September 2007
Ocarina	1,500,000	31 May 2005
Southwind	3,000,000	5 July 2005

[6] WKN passed away in March 2013, leaving behind his widow, Kathryn Ma ('Kathryn'), a son and a daughter. Kathryn was appointed the personal representative, executrix and trustee of WKN's estate. She had requested that shares issued (set out in the table in the preceding paragraph) to WKN in these companies be registered in her name as the executrix of WKN's estate. WKC and WKY refused and commenced suits with respect to the issued shares in the same year of WKN's demise. In essence, they sought to nullify the issued shares because the issuances were in breach of s. 132D(1) of the Companies Act 1965 ('CA 1965') as they were carried out without the shareholders' prior approval. In addition, WKC and WKY also alleged that some of the requirements under the companies' Articles of Association ('AA') were not complied with. The appellant reciprocated by filing her suits where she sought to validate the shares issued under ss. 63 and/or 355 CA of the 1965. Therefore, the flipside to the three suits commenced against her were her suits for validation. All six suits were tried jointly at the High Court. As these suits commenced *via* originating summonses, some deponents testified orally and were subjected to cross-examinations.

[7] For convenience, these appeals shall be referred to as follows:

Appeal number	Referred to as	Companies concerned
Q-02(W)-42-01/2020	Appeal 42	WTK Realty
Q-02(NCvC)(W)-38-01/2020	Appeal 38	
Q-02(NCvC)(W)-39-01/2020	Appeal 39	Ocarina
Q-02(W)-44-01/2020	Appeal 44	
Q-02(W)-43-01/2020	Appeal 43	Southwind
Q-02(NCvC)(W)-41-01/2020	Appeal 41	

A [8] The following orders were sought at the High Court against WKN in respect of the following appeals:

Appeal 42: WKC sought to nullify the issuance of 4,000,000 ordinary shares of WTK Realty allotted to WKN on 28 September 2007.

B Appeal 38: Kathryn's application to validate the issuance of the 4,000,000 shares of WTK Realty to WKN under section 63 and/or section 355 CA 1965 and WKN's AA.

Appeal 39: WKC and WKY sought to nullify the issuance of 3,000,000 ordinary shares of Southwind allotted to WKN on 5 July 2007.

C Appeal 44: Kathryn's application to validate the issuance of the 3,000,000 ordinary shares in Southwind under section 63 and/or section 355 CA 1965 and WKN's AA.

D Appeal 43: WKC and WKY sought to nullify the issuance of ordinary shares in Ocarina on 5 July 2007: 1,500,000 allotted to WKN.

Appeal 41: Kathryn's application to validate the issuance of the 1,500,000 ordinary shares of Ocarina allotted to WKN under section 63 and/or section 355 CA 1965 and Ocarina's AA.

E [9] It is not disputed that the issued shares did not comply with the requirements of s. 132D(1) of the CA 1965 nor the companies' AA. Kathryn however relied heavily on the principles enunciated in the English case of *In re Duomatic Ltd* [1969] 2 Ch 365 ('*Duomatic* case') which laid down the proposition that matters which were to be done formally may be done informally, provided that they were assented to by the members of the company. Both sides, including the High Court, were in agreement with this proposition. Kathryn's case in the High Court was that the informal assent of the shareholders occurred after the shares were issued, which would fall under the *Duomatic* principle. This is where WKC and WKY disagreed, as they contended that the informal assent must occur prior to the issuance. The High Court agreed with their proposition.

F [10] The core issue of these appeals is whether the High Court erred in holding that the *Duomatic* principle applies only if the assent was obtained prior to the shares being issued.

H The High Court's Decision

I [11] The High Court, at the outset, determined that the core issue is whether the shares issued to WKN contravened s. 132D of the Companies Act 1965 and the companies AA. The appellant had relied on, amongst others, the following to substantiate her contention that the respondents knew the issued shares:

(i) Form 11 (notice of resolution) regarding WTK Realty's Extraordinary General Meeting ('EGM') held on 28 September 2007, where an ordinary resolution was passed regarding the issued shares in WTK Realty;

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(ii) Form 24 dated 28 September 2007 (return of allotment of shares); and
(iii) audited accounts of WTK Realty.

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[12] Concerning Form 11, it is not disputed that it was lodged with the Registrar of Companies. The High Court, however, disregarded it because it was only signed by WKY, and the shareholders' resolution was not produced at trial.

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[13] Regarding Form 24, it was also not disputed that it had been lodged with the Registrar of Companies. The High Court similarly held that although WKY signed the Form, WKC did not sign it and that the fact that it was lodged did not provide direct evidence of prior shareholders' approval for the issued shares.

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[14] As for the 2007 audited accounts, which contained information on the issued shares, the High Court again held that WKC did not sign it. There were, nevertheless, subsequent audited reports. The High Court held that the subsequent knowledge or consent of the statutory reports and accounts could not be equated with prior approval of the company in general meetings as required under s. 132D(1) of the CA 1965. Nevertheless, The High Court held that WKC did not sign any of the audited accounts and could not be deemed to have knowledge or acquiesce to the issued shares. The appellant contended that an adverse inference should be drawn against WKC as he did not call WKY as a witness due to the fact that WKY had signed the audited accounts. The High Court, in refusing to draw an adverse inference, held that as the proceedings were by way of an originating summons and the deponents were subjected to cross-examination on their respective affidavit, the only consequence would be that his affidavit would be disregarded in line with O. 38 r. 2(2) of the Rules of Court 2012.

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[15] The High Court distinguished the *Duomatic* case by stating that there was a prior formal assent of the shareholders, who were also directors, who had a right to attend and vote at a general meeting. The High Court emphasised that the shareholders' approval, be it formal or informal, had to exist prior to the shares being issued and not after.

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[16] In respect of the appellant's application for validation under ss. 63 and 355 of the Companies Act 1965, the High Court in dismissing the application held that apart from the breaches of the companies' AA, there was no prior shareholders' approval for the issued shares based on the absence of any minutes of the shareholders meeting. The High Court opined that a validation order would cause injustice to WKC as his shares would be diluted and does not fulfil the criteria under s. 355(3)(b) of the CA 1965.

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A Findings

[17] It is not disputed that there were no prior shareholders' approval for the issued shares. The fulcrum of the respondents' argument is premised on s. 132D(1) and (6) of the CA 1965, in that shares issued without the company's prior approval in a general meeting shall be void. Learned
B counsel for the respondents with candour submitted that the approval does not need to be obtained in a general meeting, as held by numerous authorities. This court in *Khaw Tiew Chai v. Lee Chai Seng & Ors And Another Case* [2018] CLJU 1516; [2018] 1 LNS 1516, in affirming the High Court's
C decision, held that the issuance of the new shares did not have to be approved by the general meeting because all the existing shareholders are also directors and were present at the board of directors meeting when approving the issuance of the new shares. Singapore's Court of Appeal had similarly held the same in *Jimat Awang & Ors v. Lai Wee Ngen* [1995] 3 SLR(R) 496 when
D construing s. 161(1) of the Singapore Companies Act, the equivalent of our s. 132D. The court there held that "... the unanimous and informal assent by all the members of the company in some other manner is as effective as a resolution passed at a general meeting, even if the assent is given at different times ...". The respondents' concession, however, ends there. They contended that they had no knowledge of the issued shares and never assented to them.

E [18] We will first address the principles enunciated in the *Duomatic* case. The *Duomatic* case concerns directors' remuneration, which required the shareholders' prior approval under the UK Companies Act 1948 and the company's articles of association. The directors there occasionally withdrew
F sums from the company as and when their personal needs required, without obtaining prior approval. The withdrawals, however, were reflected in the company's accounts, which the directors approved. Buckley LJ held:

G ... where it can be shown that all shareholder who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.

H [19] We take the view that the *Duomatic* principle clearly applies whether the approval was given in advance or prior to the event. Approval can take many forms, such as agreement, ratification, waiver, or estoppel. This principle was clearly set out in the case of *EIC Services Ltd v. Phipps* [2004] 2 BCLC 589 where Neuberger J held:

I The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them

to deny that they have given their approval. *Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether the members of the group give their consent in different ways at different times does not matter.* (emphasis added)

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[20] This principle was further applied and enunciated in various later decisions: *Multinational Gas and Petrochemical Co v. Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, *Weatherley v. Weatherley and others* [2019] 1 BCLC 520 and *Dickinson v. NAL Realisations (Staffordshire) Ltd* [2020] 1 WLR 1122. The *Duomatic* principle has been applied by our courts in amongst others *Genisys Integrated Engineers Pte Ltd v. UEM Genisys Sdn Bhd & Ors* [2009] CLJU 1202; [2009] 1 LNS 1202; [2008] 6 MLJ 237, *Tan Mei Li & Ors v. KSCH Property Sdn Bhd* [2019] CLJU 1186; [2019] 1 LNS 1186. In the latter case, the appellate court held:

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[89] We further agree with learned counsel for the appellants that the running or management of a company's affairs in the "fashion" not usually understood or seen, where decisions in respect of some matters complained of were taken informally is no reason to suggest anything less of such decision.

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[21] The High Court had misconstrued the facts of the *Duomatic* case when it held that the assent in that case, namely the payment of the directors' salaries without the shareholders' approval, predated the act in question when it was clear that the shareholders' assent came months after the act. The High Court erred in holding that the approval had to be given prior to the shares being issued and had erroneously applied the correct law on the facts. We are of the opinion that the *Duomatic* principle applies whether the assent was given before or after the impugned act in question.

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[22] We now come to the High Court's findings on the facts. There is no dispute that Form 11 was lodged with the Companies Commission of Malaysia, nor was the Form alleged to be forged. This was concerning the EGM held on 28 September 2007. An ordinary resolution was passed at this EGM to increase WTK's paid-up capital by 4,000,000 shares. What seemed to have occupied the High Court was that WKN did not sign the Form and that the appellant did not produce the resolution to Form 11 on the issued shares.

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[23] WKC had, under examination, agreed that WKN and WKY were the brothers in charge of managing WTK Realty's business in Malaysia. It is, therefore, incongruous to deem Form 11 invalid as WKN signed it. As Kathryn had produced Form 11 evidencing that the EGM to approve the issuance of the 4,000,000 shares was held on 28 September 2007, the burden lies on the WKC to prove that the resolution was not attached to Form 11 or that the EGM never took place, mainly when WKC had access to the companies' books and records. The High Court erred in accepting WKC's contention that the resolution was not attached to Form 11 when the burden lies on him to prove so.

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A [24] In any event, even if we were to assume that there was no resolution
attached to Form 11, this does not vitiate the resolution passed at the EGM
or render the shares issued void. A case in point is the Singapore Court of
Appeal's decision in *Jimat bin Awang (supra)* which dealt with s. 161(1) of
the SCA 1967 (the equivalent of s. 132D of the CA 1965), which is as
B follows:

Indeed the statutory regime is put in place primarily to protect the interests
of shareholders so that directors cannot act to their detriment without
their knowledge and prior consent. Although there is a requirement for
any resolution giving prior approval to be filed, the failure to do so only
C attracts a fine. By itself, it does not vitiate the approval and consent of
the shareholders. More crucially, it does not make the issue of the shares
void ...

[25] We are therefore resolute that the High Court erred in disregarding
Form 11 and failing to hold that WKN had failed to prove his assertion.

D [26] There is then Form 24 dated 28 September 2007 on the allotment of
4,000,000 shares to WKN. It was not disputed that this form had been
lodged with the Registrar of Companies. The High Court, however,
disregarded it because WKC did not sign it. The High Court also held that
the form does not provide direct evidence that the shareholders' approval
E was obtained prior to shares being issued.

[27] The High Court disregarded the fact that both WKN and WKY had
signed the form and that it was signed on behalf of the Board of Directors.
That WKC did not sign the form does not negate assent or knowledge on his
part. In this case, many factors inferred WKC's knowledge from his conduct.
F Informal assent can be evidenced by conduct; *EIC Services (supra)*.

[28] The most compelling evidence to prove that the respondents had
knowledge and acquiesced to the issued shares were the directors' report and
audited accounts from as early as 2005 to 2011. The High Court had
erroneously disregarded the evidence showing that the board had consistently
G approved the directors' reports throughout those years.

[29] One event in particular was when it was tabled at the Adjourned
General Meeting ('AGM') of WTK Realty held on 30 June 2008. The
minutes of the AGM show that WKC was present, although WKC had
denied being present. The High Court erred when it preferred WKC's denial
H over contemporaneous records. It is the court's function to critically test oral
evidence against contemporaneous documents. This tenet was enunciated by
the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU
119; [1979] 1 LNS 119; [1979] 2 MLJ 229, where the apex court held as
I follows:

Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.* (emphasis added)

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[30] Further, even though WKC did not sign the audited accounts, he had, under cross-examination, agreed with the suggestion that the report had been signed on his behalf by WKY. Faced with this admission, the High Court erred in holding that WKC could not have known or assented to the issued shares. Other documents were also lodged showing the issued shares, such as the forms of annual return and circulars for the shareholders.

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[31] The most critical evidence was WTK Realty's Extraordinary General Meeting ('EGM') held on 6 April 2013, where the shareholders, which included WKC and WKY, voted to approve the conversion and capitalisation of the convertible preference shares. The shareholders needed to approve increasing WTK Realty's share capital from 16,400,000 to 19,150,000 shares. This exercise was required to enable WTK Realty to obtain a banking facility as it desperately needed funds for working capital; the bank concerned required an additional capitalisation of RM2.5 million. WTK Realty had 16,400,000 ordinary shares at that time. This included the issued shares of 4,000,000 to WKN. The EGM was held to pass a resolution to convert and capitalise the preference shares, which led to the company's ordinary shares increasing from 16,400,000 to 19,150,000. WKC and WKY had in that EGM voted in approval with full knowledge that WTK Realty's shares included the issued shares.

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[32] Consequently, they had, by conduct, approved of the issued shares. WKC, under cross, admitted that he knew that the 4,000,000 issued shares were part of the 19,150,000 shares. The suits against Kathryn in respect of the issued shares were filed prior to the EGM.

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[33] WKC and WKY could not approbate and reprobate. Given two choices, they must elect one stance. The English Court of Appeal in *Verschures Creameries, Limited v. Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608 explained the concept of approbate and reprobate as follows:

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- A A plaintiff is not permitted to “approve and reprobate.” The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election – namely, that no party can accept and reject the same instrument: *Ker v. Wauchope* (1); *Douglas-Menzies v. Umphelby* (2). The doctrine of election is not however confined to instruments. *A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. That is to approve and reprobate the transaction.*
- B (emphasis added)
- C [34] The High Court clearly failed to find that WKC and WKY had approved and reprobated. The shareholders’ resolution passed at the EGM to capitalise the share capital, which included the issued shares, must be treated as an affirmation or ratification. All these factors that we have set out apply to the three companies.
- D [35] The High Court, in its findings, acknowledged that WKN and WKY had subsequent knowledge of the issued shares but held that they do not amount to prior unanimous assent of the shareholders. The High Court failed to consider that the family-owned companies conducted their business informally and would sometimes disregard formal requirements. The High Court had disregarded WKC’s admission in his affidavit that not all shares
- E issued in the corporate history of WTK Realty had complied with strict formalities under s. 132D(1) of the CA 1965.
- F [36] Under the *Duomatic* principle, formalities may be disregarded if shareholders had, by conduct, waived the requirements; see *Herman v. Simon* [1990] 8 ACLC 1094. This is particularly applicable to family-run companies, as it is a distinctive hallmark of family-run companies where the affairs are frequently conducted informally and often without adhering to the formal requirements of statutes or the company’s AA.
- G [37] A final point to note is the delay by WKC and WKY in seeking declaratory reliefs. Their suits were commenced almost six to seven years after the shares were issued to WKN. The lengthy delay connotes knowledge and acquiescence on their part. As the remedy of declaration is discretionary in nature, the court should be less inclined to grant them where the party seeking the reliefs is guilty of laches; *Lim Teow Yong & Sons Sdn Bhd v. Infolity Sdn Bhd & Anor* [2015] CLJU 311; [2015] 1 LNS 311; [2015] MLJU 2312. A lengthy delay would amount to acquiescence. This concept was lucidly explained in *Cheah Kim Tong & Anor v. Taro Kaur* [1989] 2 CLJ 791; [1989] 1 CLJ (Rep) 378; [1989] 3 MLJ 252:
- I The word ‘laches’ is one of the most over-worked words in legal arguments before the courts and it does not seem to have been fully appreciated for its nature. It means definitely something more than a mere delay; it means such delay amounting to acquiescence. Here the word

acquiescence is not quite the same acquiescence as used in equitable estoppel, where, generally a plaintiff stands by watching a violation of his right in progress and keeping silent, *but here, there is a completed violation of a right and a plaintiff has become aware of it. He either assents to it, or his delay in asserting his right has been so long as to give rise to an inference of such assent.* (emphasis added)

Conclusion

[38] We are therefore unanimous in finding that the High Court had misdirected itself on the applicable law and applied it erroneously to the facts. We also opine that the High Court did not give sufficient judicial appreciation of the evidence before it. We are of the view that there are merits to Appeals No. 42, 39 and 43 and unanimously allow the appeals. As the appellants' appeals in Appeals No. 42, 39 and 43 are permitted, there is no necessity for the validation applications sought by the appellants in Appeals No. 38, 44 and 41. The High Court's decisions are therefore set aside, including the costs. We further award costs of RM30,000 for each appeal here and below to the appellants subject to allocatur. Any costs paid at the High Court will be refunded to the appellants.

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